



IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 144 OF 2000

MARY NANJALA MUHALYA ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

AMBROSE KIPRUTO ::::::::::::::::::::::::::::::::::: DEFENDANT

RULING

1. The applicant Mary Nanjala Muhalya who is the plaintiff in this case filed a notice of motion dated 16th December, 2013 in which she seeks orders that the respondent Jane Chelagat Singoei be substituted in place of the defendant Ambrose Kipruto (now deceased) The respondent is wife of the late Ambrose Kipruto who was the defendant in this case.
2. The applicant contends that the suit herein as against the defendant has abated, and that as no application was made for substitution within one year, the same should be revived and the respondent made a defendant. She contends that the delay in substitution was due to misunderstanding between her and her previous lawyers who could not release her file due to financial issues.
3. The applicant contends that the respondent as wife of the deceased is intermeddling with the estate of her deceased husband and as such she should be substituted in place of her deceased husband.
4. The application was opposed by the respondent based on grounds of opposition dated and filed in court on 2nd July 2014. The respondent contends that the applicant's application is misconceived and bad in law. That the respondent is not the administrator of the estate of the late Ambrose Kipruto and can therefore not be substituted in his place. That the application is a fragrant abuse of the due process.
5. I have considered the application as well as the opposition to the same by the respondent. The issue which emerges for determination is whether a person who is not a legal representative of a deceased person can be substituted in his place. In the present application it is conceded by the applicant that the respondent is not the administrator of the estate of her deceased husband.
6. The advocate who argued the application on behalf of the applicant submitted that they are seeking to substitute the respondent in place of her late husband because she is intermeddling with the affairs of the estate of the deceased and should therefore be substituted in his place as administrator de son tort. Mr Ambutsi argued that since the respondent is intermeddling with the estate of the deceased, she should be substituted as administrator de son tort. He submitted that the intermeddling with the deceased's estate will be proved during the hearing once substitution is allowed. Mr Ambutsi relied on a decision from supreme court of India in the *case of Sudama*

Devi & Others -Vs- Jogendra Choudhary & Others decided on 29th September, 1986 AIR 1987 Pat 239, 1987 (35) BLJR724. He also relied on the decision of the court of Appeal (Enugu Judicial Division in the ***case of Mrs Eucharia Nwinyi & Others -Vs- Mr Anthony Ikechukwu Okonkwo (2013) LPELR – 21216 (CA).***

7. Mr Kiarie for the respondent relied on the ***case of Najero -Vs- Serwanga at the High Court of Uganda (1974) EA 327.*** The two decisions cited by the applicant dealt extensively with the issue of intermeddling in a deceased's properties and the meaning of administrator de son tort. I will come back to the decisions cited hereinabove later.

8. Order 24 Rule 4(1) of the Civil Procedure Rules provides as follows;-

4(1) “Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit”.

9. Section 2 of the Civil Procedure Act defines legal representative as follows;-

“Legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

10. A legal representative as defined in the Civil Procedure Act is equivalent to the definition of a personal representative as defined under the Succession Act Cap 160 Laws of Kenya. Section 3 of the Law of Succession Act defines “Personal representative” as “the executor or administrator as the case may be of a deceased person”. Administrator in the same section is defined as “ a person to whom a grant of letters of administration has been made under this Act”. It is therefore clear that a legal representative is a person to whom a grant of letters of administration has been made under the Succession Act. As the applicant has not been granted letters of administration in respect of the estate of her deceased husband, she cannot be substituted in his place in this suit.

11. In the ***case of Sudama Devi & Others -Vs- Jogendra Chondhary & Others (Supra) the Supreme Court of India*** was interpreting section 2(11) of the code of Civil Procedure which states as follows;-

“Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued”

It is clear that unlike in the Kenya Civil Procedure Code where legal representative is defined, in the Indian Code of Civil Procedure, legal representative includes any person who intermeddles with the estate of the deceased person. This is why S. S. Sandhawalia CJ had this to say regarding section 2 (11) of the Indian Code of Civil Procedure;-

“It is plain from the above that the definition herein is a wide and inclusive one and conceives of two distinct categories. Firstly, the heirs or person, who in law represents the estate of a deceased person. However at par with them and in a class by itself is any person who intermeddles with the estate of the deceased. Such a person is equally a legal representative”

12. In the Kenyan situation the definition of legal representative does not envisage any other person and therefore the position remains that it is only a legal representative who can be substituted in

place of a deceased defendant or plaintiff as the case may be. An intermeddler is not recognized in the Kenyan Law and as such cannot be substituted in place of a deceased person. This is unlike in India where an intermeddler can be substituted in place of a deceased person. This is possible because unlike in Kenya, the code of Civil Procedure of India recognizes intermeddlers who can be substituted in place of deceased parties to suits. In the chambers Twentieth Century Dictionary, the word “meddle” is given the meaning to interfere unnecessarily, or, without being entitled”. In the new Oxford illustrated Dictionary, “meddle” means to concern one self with what is not ones business. According to Blacks Law Dictionary, 9th Edition by Bryan A. Gaymer, page 671, an executor de son tort is a person who without legal authority, takes on the responsibility to act as an executor or administrator of a deceased's property usually to the detriment of the estate's beneficiaries or creditors. He has taken upon himself the responsibility of an executor by his wrongful dealings in the estate. He is an executor by virtue of his delict. He is deemed such an executor because he had no legal authority to meddle in the estate.

13. It would appear that in Kenya, intermeddlers in the estate of a deceased can only be punished for doing so for to intermeddle in the property of a deceased is a criminal offence which according to section 45 of the law of Succession Act Cap 160 Laws of Kenya an intermeddler may be fined 10,000/= or imprisoned for one year. The intermeddler may also be called upon to account to a person lawfully entitled to administer the estate of a deceased. There is no basis in law for an intermeddler to be substituted as a party. The only person recognized is a legal representative. This being the position, I find that the respondent herein cannot be substituted as a defendant in this suit. The upshot of this is that the application herein lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 16th day of September, 2014.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for respondent and M/S Gakuo for Mr Kundu for applicant.
Court Clerk – Kassachoon.

E. OBAGA

JUDGE

16/9/2014